

MOHAMED ANUARDIN ABD. SALAM & ANOR.

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v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, IPOH
KANG HWEE GEE J
[CRIMINAL APPEAL NO: 52-8-1996]
24 SEPTEMBER 1996

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CRIMINAL PROCEDURE: Trial - Partly-heard case - Change of Magistrate during hearing - Decision of succeeding Magistrate to continue hearing case from where it had been left - Whether a matter of discretion - Whether discretion judicially exercised - Whether hearing to be commenced *de novo* - Criminal Procedure Code s. 261

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CRIMINAL PROCEDURE: Appeal - Partly-heard case - Change of Magistrate during hearing - Decision of succeeding Magistrate to continue hearing case from where it had been left - Whether a procedural ruling - Whether a final order - Whether appealable - Criminal Procedure Code ss. 261, 307(a)

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CRIMINAL PROCEDURE: Trial - *Voir dire* - *Res judicata* - General application of - Refusal to allow appellant to re-examine witnesses who had appeared in a concluded *voir dire* - Binding judgment already made in *voir dire* proceedings - Whether matter *res judicata*

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This was an appeal against the decision of the learned Sessions Court Judge, Ipoh, ('the Judge') ordering that the case against the appellants, which was partly heard by the previous Sessions Court Judge ('the previous Judge'), be continued by him from the point where it had been left under s. 261 of the Criminal Procedure Code. The facts showed that the appellants were charged in the Court in 1990 for offences under the Prevention of Corruption Act 1961, and that some 13 witnesses had given evidence at the time the Judge took over proceedings on 25 March 1996. The complainant, however, had not finished giving his evidence, and the evidence of the Investigating Officer was yet to be recorded. The Judge took the view that to hear the case *de novo* would occasion undue stress on the witnesses and hence decided to continue with the trial the way he did. The facts further showed that the Judge, having decided to continue the case, had also refused the first appellant's application to re-summon and re-hear witnesses who had given evidence in the trial within a trial held before the previous Judge. Before the learned appellate Judge herein, the appellants argued, *inter alia*, that (i) the Judge had wrongly exercised his discretion in not hearing the case *de novo* (ii) the Judge had

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- a* fallen into error, and had contravened the provision of s. 261(a) Criminal Procedure Code, when he disallowed the appellants from rehearing witnesses who had given evidence in the *voir dire* proceedings. The Public Prosecutor argued *inter alia* that the order pronounced by the Judge was procedural in nature, and hence not appealable under s. 307(i) Criminal Procedure Code.
- b* **Held:**
- c* [1] The discretion exercised one way or the other by a Judge of the Sessions Court under s. 261 of the Criminal Procedure Code to continue a case left uncompleted by his predecessor is a procedural decision. An order made pursuant to that decision must therefore be a procedural order which is not appealable under s. 307(1) of the Code. The instant case is no exception.
- d* [2] The judgment of the Sessions Judge in the instant case could not be a final order as any exercise of his discretion, even if wrongful, could still be raised at the appeal of the case proper. And even if the appellants are convicted, irrespective of whether he appeals or not, the High Court may act under s. 261(b) of the Code to set aside the conviction.
- e* [3] *Public Prosecutor v. Raymond Chia Kim Chwee & Anor* ought to be distinguished from the present case. The order made by the Court therein disallowing the appellants' application to take photocopies of documents required for their defence was a final order, as the defence would have to proceed with the trial without those documents. Unlike the situation in the present case, the only recourse they had was to appeal against the order. They would not be in a position to raise as a ground of appeal later when the substantive appeal is heard at the High Court that they had to conduct their defence without those documents.
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- g* [4] Assuming that the order is appealable, this Court must decide whether the discretion exercised by the Sessions Court Judge was rightly exercised by him. In this regard, this Court is bound by the fact that s. 261 of the Code has conferred on the Sessions Court Judge a discretion to decide one way or the other, and is further bound by the principle that so long as he exercises that discretion judicially, this Court would not be in a position to interfere.
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- i* [5] To hear the case *de novo* would not be the best course to adopt as to a large extent, the ability of the witnesses to recall events may have diminished. It would also unnecessarily prolong the trial and stretch the public purse. On the facts, there was no flaw in the exercise of discretion by the Sessions Court Judge as to merit interference.

[6] The argument that the Judge, having decided to continue the hearing, ought not to have disallowed the first appellant to re-summon and re-hear the witnesses who had given evidence at the trial within a trial lacks objectivity as it ignores that fact that a decision had already been made in that *voir dire* proceedings. To interpret s. 261(a) without regard for the decision already made in the *voir dire* would run counter to the doctrine of *res judicata*. The Judge was right to disallow the first appellant to re-summon and re-examine the witnesses in question.

[Both appeals dismissed.]

Cases referred to:

Public Prosecutor v. R.K. Menon & Anor. [1978] 2 MLJ 152 (*refd*)
Public Prosecutor v. Hoo Chang Chwen [1962] MLJ 284 (*refd*)
Public Prosecutor v. Raymond Chia Kim Chwee & Anor. [1985] 2 MLJ 436 (*dist*)
Oh Keng Seng v. Public Prosecutor [1976] 1 MLJ 143 (*refd*)
Mohamed Idris b. Hj. Mohamed Said v. Rex [1949] 15 MLJ 31 (*not foll*)
Sambasivam v. Public Prosecutor [1950] 16 MLJ 145 (*foll*)

Legislation referred to:

Criminal Procedure Code, ss. 51, 129(i)(b), 261(a), (b), 307(i)
Prevention of Corruption Act 1961, ss. 3(a)(ii), 4(a)

Other sources referred to:

Criminal Pleading Evidence and Practice, Archbold, 41st Edn., 4-109
Litigation: Evidence & Procedure, Aronson Reaburn Weinberg, Butterworth 3rd. Edn., 18.14
The Code of Criminal Procedure, Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, 13th Edn.,
For the first appellant - Hamid Sultan; M/s. Hamid Sultan & Rakan-rakan
For the second appellant - S. Theivanthiran; M/s. Thevin, Chandran & Wong
For the respondent - Ahmad Bache, DPP

JUDGMENT

Kang Hwee Gee J:

This was an appeal against the order of the learned Sessions Court Judge Ipoh in ordering that the case against the appellants which was partly heard by the previous Session Judge be continued by him from the point where it had been left by previous Session Judge under s. 261 of the Criminal Procedure Code.

The 1st appellant Mohamed Anuardin b. Abd. Salam was charged in the Sessions Court with an offence of corruptly receiving for himself two sums of money RM3,500 in cash and RM8,000 in cheque from one Lee Kaw as

a an inducement for the 2nd appellant, Azizan Yahya, (an Assistant Secretary, Immigration Unit of the Ministry of Home Affairs) to secure the approval for the renewal and return of the said Lee Kaw's passport under s. 3(a)(ii) of the Prevention of Corruption Act 1961.

b The 2nd appellant, Azizan bin Yahya, was charged under the same section of the Act with the offence of abetting the offence of corruptly accepting the two sums from the 1st appellant for the same purpose on the 1st charge.

c In addition, the 2nd appellant also faced a second charge of corruptly receiving gratification for himself as an agent of the Government of Malaysia from Lee Kaw the sum of RM6,000 in cash, through one Doraisingam Rengasamy as a payment in relation to his principal's affairs i.e. to obtain approval for the renewal and the return of a passport belonging to the said Lee Kaw under s. 4(a) Prevention of Corruption Act 1961.

d The offences were alleged to have been committed between the months of May and July 1990. The record shows that the trial was commenced on 14 September 1994 before Sessions Judge, Encik Mohd. Zaki Md. Yasin. Some 13 witnesses had already been called to give evidence for the prosecution.

e On 1 October 1995 before the hearing of the case could be completed, Mohd. Zaki had to go on transfer as the State Legal Adviser, Kedah. His position at the Sessions Court was taken over by Encik Hassan bin Lah. When Encik Hassan sat on 25 March 1996 he decided to exercise the discretion open to him under s. 261 of the Criminal Procedure Code to continue the case from where Encik Mohd. Zaki had left. He overruled the objections of both Counsel for the appellants that the proceedings be heard *de novo*. Hence this appeal.

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The Grounds of Appeal

Both the appellants' complaints in this appeal appear to be similar. They could be condensed into the following two short statements:

g (i) the Sessions Judge had wrongly exercised his discretion in not hearing the case *de novo* in the circumstances of this case, and

h (ii) having decided not to hear the case *de novo*, he fell into further error in ruling that the appellants would not be allowed to demand that the witnesses in respect of those called in the *voir dire* proceedings be resummoned and reheard, contrary to the provision of s. 261(a) of the Criminal Procedure Code which confers upon the appellants such a right.

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A Preliminary Point: Is the Order Appealable?

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Under s. 307(i) of the Criminal Procedure Code any person who is dissatisfied with any judgement, sentence, or order pronounced by the lower Court may prefer an appeal in respect of any error of law or fact in a criminal case or matter.

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It is trite law that any order so pronounced by a subordinate Court which is merely procedural in nature is not appealable under s. 307(i). Thus in *Public Prosecutor v. R.K. Menon & Anor.* [1978] 2 MLJ 152, it was held that an appeal did not lie against the decision of the President of the Sessions Court made in the course of a trial wherein he had overruled the objection of appellants' Counsel that the prosecution had not complied with the requirement of s. 129(i)(b) of the Criminal Procedure Code which Counsel submitted was the pre-requisite to the commencement of proceedings against the appellants in that case. It was held that the ruling made by the learned President of the Sessions Court was merely a procedural ruling and was not appealable. A procedural ruling it was held, was not a judgement, sentence or order within the meaning of s. 307(i) of the Criminal Procedure Code. In so holding the Court followed the earlier case of *Public Prosecutor v. Hoo Chang Chwen* [1962] MLJ 284. In that case Rose CJ held that a ruling of the Magistrate that a statement applied for by the defence was a first information report and not a statement made in the course of police investigation (and must therefore be supplied to the defence), was merely a procedural ruling. It was held that to allow such an appeal on the ruling would:

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open the door to a number of appeals in the course of criminal trials on points which are in their essence procedural. The proper time, of course, to take such points would be upon appeal, after determination of the principal matter in the trial Court.

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In *Public Prosecutor v. Raymond Chia Kim Chwee & Anor.* [1985] 2 MLJ 436, one of the questions the Supreme Court had to decide (on a reference on issues of law of public interest) was whether an appeal lie to the High Court from an order made by a subordinate Court ordering the prosecution to supply photocopies of documents to the defence before the trial under s. 51 of the Criminal Procedure Code appealable. It was held (Hashim Yeop A. Sani SCJ) that:

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The word 'order' is preceded by the words 'judgement' and 'sentence'. The order must therefore be a final in the sense that it is final in its effect as in the case of a judgement or sentence. The test for determining the finality of an order is to see whether the judgement or order finally disposes of the rights of the parties. See some discussion on this point in *Mohd. Amin Bros. v. Government of India* in respect of civil suits. The right of a person to ask for a document or

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- a* other material in a criminal proceeding under s. 51 is a right exercisable at the discretion of the Court. Thus a decision or order to issue a summons under s. 51 of the Criminal Procedure Code is a final order in the sense that it is final in its effect and therefore appealable under s. 307(i) of the Criminal Procedure Code. It is distinguishable from a purely “procedural” ruling as described in *Public Prosecutor v. Hoo Chang Chwen* and *Public Prosecutor v. R.K. Menon & Anor.*
- b* In the former case Rose CJ of Singapore dealt with the appeal of the admissibility of certain statements and the learned Judge held that the ruling of the Magistrate was a procedural ruling and therefore not an appealable order. In latter case Ajaib Singh J also took the view that a ruling on a point of law relating to non-compliance with s. 129(i)(b) of the Criminal Procedure Code was a procedural and non-appealable ruling.
- c* The *Raymond Chia* case was cited by Counsel for the 2nd appellant, Encik Thevin, who sought to justify the legality of this appeal on the principle enunciated in that case that the order of the Sessions Judge was final in its effect in the sense that the trial would have to proceed on the format set by the Sessions Court Judge.
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- e* In my judgment the order of the Sessions Judge in the instant case could not be a final order as any exercise of his discretion even if wrongful, could still be raised at the appeal of the case proper. Further, even if the appellants are convicted, irrespective of whether he appeals or not, the High Court may act under s. 261(b) of the Code to set aside any conviction if it is of the opinion that the appellants have been materially prejudiced by the fact that the conviction was on evidence not wholly recorded by the Judge who convicted them.
- f* *Raymond Chia (supra)* could be readily distinguished. In that case an application was made at the pre-trial stage to the Session’s Court to compel the prosecution to allow the appellants to take photocopies of documents they required for their defence. The order made by the Court to disallow the application must therefore be a final order as the defence would have to proceed with the trial without those documents. Unlike the situation in the
- g* instant case, the only recourse they had was to appeal against the order. They would not be in a position to raise as a ground of appeal later when the substantive appeal is heard at the High Court that they had to conduct their defence without those documents.
- h* It is clear to me that the discretion exercised one way or other by a Judge of the Sessions Court under s. 261 of the Criminal Procedure Code to continue a case left uncompleted by his predecessor must be a procedural decision. An order made pursuant to that decision must therefore be a procedural order which is not appealable under s. 307(i) of the Code. The instant case is no
- i* exception.

On this ground alone, the appeal would have to fail. But as there was no direct authority on this issue, for the sake of settling all questions relating to this appeal, I also proceeded to hear the parties on the merit on the assumption that the order was appealable. a

Whether Sessions Judge had Rightly Exercised his Discretion b

Section 261 of the Criminal Procedure Code provides that:

Change of Magistrate During Hearing.

Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial c

Provided as follows: d

- (a) In any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
- (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if such Court is of opinion that the accused has been materially prejudiced thereby, and may order a new trial. e

It would appear from the grounds of decision of the Sessions Court Judge that the trial had reached a stage where the prosecution had called some 13 witnesses by the time he took over proceedings on 25 March 1996. The star witness in the case, the complainant, had not finished giving his evidence. The position taken by Counsel for the 2nd appellant, Encik Thevin in his submission before me was that on account of the number of witnesses that had been called by the prosecution, the succeeding Judge would not be in a position to fairly judge the case against the appellants as he had not seen and heard them in person as to be able to assess their demeanour. He relied on the judgement of Ajaib Singh J in *Oh Keng Seng v. Public Prosecutor* [1976] 1 MLJ 143 wherein at p. 144 line F His Lordship in deciding that the case should be continued by the succeeding President of Sessions Court *de novo*, justified his decision in the following words: f

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The provision in s. 261 of the Criminal Procedure Code which empowers the succeeding Magistrate or President to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised h

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a with caution. It must be appreciated that the succeeding Magistrate or President who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the demeanour and credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a Magistrate or President but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence. The provision however may generally be exercised where the evidence to be acted on is more or less formal or is largely uncontroversial and where the credibility of any material witness is not involved. In the case of *Mohamed Idris bin Haji Mohamed Said v. Rex* the appellant was convicted by a Magistrate on evidence partly recorded by him and partly by his predecessor. The witness whose evidence was acted on by the succeeding Magistrate was a crucial witness and there was nothing to prevent this witness evidence if there had been a trial *de novo*. In ordering a new trial Murray Aynsley CJ referring to s. 254 of the Straits Settlement Criminal Procedure Code (which is *in pari materia* with s. 261 of our Code) said that:

d the power given under the section is of value, particularly when it is used for evidence of a more or less formal character, or where the witness cannot be produced. In the present case the witness whose evidence was so acted on was a crucial one, and I cannot think that a decision can be regarded as satisfactory where it is based on evidence given before another Magistrate particularly when there is nothing to prevent the witness from giving evidence on the further hearing.

e In pointing out what he described as the danger of acting under s. 261 of the Criminal Procedure Code Hashim J. In the case of *Teay Wah Cheong v. Public Prosecutor* said that unless:

f it would cause hardship and great inconvenience to the accused person and witnesses I think it is much better for a President or a Magistrate to hear the case *ab initio* rather than take over the recording of evidence from the other President or Magistrate. For one thing the succeeding President or Magistrate cannot assess the value of the evidence recorded by his predecessor *vis-a-vis* the credibility of the witness.

g The applicant is charged with uttering seditious words. By the very nature of the charge the credibility of the witnesses is bound to be of paramount importance and I do not think that this is a proper case where the present President of the Sessions Court may continue from where it was left by his predecessor and act on the evidence already recorded. Furthermore all the 13 prosecution witnesses are readily available to give evidence. The hearing by the previous President lasted only six days and I do not think that a new trial will result in much loss of time and expense.

h I must state here that I am in complete agreement with the decision of His Lordship in so far as he decided that in the circumstances of that case it

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was more appropriate that the case be commenced *de novo* by the succeeding President. a

However, it must be noted that in that case no decision was ever made by the succeeding President of the Sessions Court one way or other under s. 261 of the Criminal Procedure Code. His Lordship had taken it upon himself to make the order that the case be heard *de novo* in the course of exercising his revisionary power to revise the order made by the preceding President who had overruled the objection of Counsel for the accused that he disqualified himself from continuing to hear the case on account that there may be a conflict of interest as he had already been transferred and taken up the post of a Deputy Public Prosecutor. In making that decision His Lordship did not have to rule whether the President of the Sessions Court had exercised his discretion rightly under s. 261 of the Code. The order he made was in fact his own order in the peculiarity of that case. b
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In the instant case however, I have to decide whether the discretion exercised by the Sessions Court Judge was rightly exercised by him. I am bound by the fact that s. 261 of the Code has conferred on him a complete discretion to decide one way or other; I am also bound by the principle that so long as he exercises that discretion judicially, that is to say according to rules of reason and justice and not according to private opinion, I am in no position to interfere. d
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In his ground of decision, the Sessions Court Judge gave seven reasons why he had decided to continue the case from where his predecessor had left off which for convenience I will now reproduce verbatim:

- [a] Pengadu dalam kes ini iaitu Encik Lee Kaw (SP7) belum lagi selesai memberi keterangan dalam pemeriksaan utama; f
- [b] Pegawai Penyiasat dalam kes ini belum lagi memberi keterangannya;
- [c] Ada di antara saksi-saksi yang telah dua kali selesai memberi keterangan kerana kes ini telah dua kali dibicarakan dan ramai daripada saksi-saksi tersebut datang dari Kuala Lumpur; g
- [d] Perbicaraan kes ini telahpun dijalankan lebih kurang selama 30 hari;
- [e] Kes ini melibatkan kesalahan yang dilakukan dalam tahun 1990;
- [f] Ada terdapat beberapa bantahan berkaitan dengan persoalan undang-undang semasa perbicaraan dijalankan yang telahpun diputuskan oleh Mahkamah; h
- [g] Sekiranya kes ini didengar semula maka perbicaraan kes ini akan hanya dapat diselesaikan dalam tempoh yang lebih lama dan ini akan menyebabkan tekanan ke atas kedua-dua tertuduh dan saksi-saksi yang terlibat. i

- a* The appellants were first charged at the Sessions Court on 24 December 1990, some six years ago but for reason not entirely clear, were given a discharge not amounting to acquittal on 12 September 1994, after the prosecution had called three witnesses to give evidence. They were recharged with the same offence soon after which culminated in the present trial. To hear the case *de*
- b* *novo* would not be the best course to adopt as to a large extent, the ability of the witnesses to recall events may have diminished. Further, it would not be in the interest of justice to adopt that course as it would unnecessarily prolong the trial. I could not therefore find any flaw in the exercise of the Sessions Court Judge's discretion which is not according to reason and justice
- c* that merits interference. The trial is being conducted in his Court. He would be the person in the best position to assess the direction the trial should take.

- Encik Thevin in his submission repeated that the opinion expressed by Murray-Aynsley CJ in *Mohamed Idris b. Hj. Mohamed Said v. Rex* [1949] 15 MLJ 31 as quoted by Ajaib Singh J in *Oh Keng Seng (supra)* that the discretion
- d* not to continue the case *de novo* should be exercised only where witnesses of a more or less formal character have given evidence or where witnesses already called could not be produced and that a decision based on evidence recorded by another Magistrate cannot be regarded as satisfactory. With respect, I must express my reservation on that decision. That case was decided
- e* in the late forties when cases heard by the Courts were much fewer. Today, Courts have by and large to deal with a greater number of cases of greater complexities. They have to be disposed of expeditiously with as few postponements as could be possibly avoided. Witnesses have to attend to their daily duties. Any repeated attendance in Court would not be in their interest;
- f* less so if they are called and recalled to give the same evidence over and over again. It is not uncommon for witnesses recalled to give evidence on the same facts to depart from the evidence they give on a previous occasion as their power of recall diminishes with time. Commencing a hearing *de novo* has the effect of not only prolonging a trial but also unnecessarily stretching the public purse.

- g* In the light of the circumstances prevailing today Magistrates and Sessions Judges need not in my view restrict their consideration only to the opinion expressed by Murray-Aynsley, CJ in *Mohamed Idris* but should also consider these contemporary factors when exercising their discretion under s. 261. The framers of the Criminal Procedure Code had the foresight to provide in
- h* s. 261 itself the assurance that the legitimate right of the accused to a fair trial is protected, which unfortunately, was not highlighted by Murray-Aynsley, CJ in his judgment. In the event that succeeding Magistrate or Sessions Court Judge decides to continue from where his predecessor left the accused has

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two recourses. First, under s. 261(a) the accused may demand that he be allowed to re-summon and re-hear any witnesses previously called; second, after the trial he could still move the High Court to set aside his conviction under s. 261(b) if he thinks that he has been materially prejudiced by the course taken by the Magistrate or Sessions Court Judge.

Whether Witnesses in the Voir Dire Could be Re-Summoned and Re-Heard

The ground of decision discloses that the previous Judge of the Sessions Court had conducted two *voir dire* (trial within a trial) both at the instance of the prosecution to determine the admissibility of two cautioned statements recorded from the respective appellant. He had completed hearing the first; the second, (in respect of the second appellant) however was still in progress when he left. The present Sessions Court Judge had ruled (despite Encik Thevin's objection) that the 1st appellant would not be allowed to recall any of the witnesses in the first *voir dire* on the ground that the said trial had terminated and a decision had already been made by the previous Judge to admit the 1st appellant's cautioned statement.

Before me Encik Thevin submitted that having decided to continue the hearing from where it was left by his predecessor it was not open to the Sessions Court Judge to decide not to allow the 1st appellant to re-summon and rehear any of the witnesses in respect of the first *voir dire* as this would be contrary to the proviso of s. 261(a). He was supported in his views by Encik Hamid, Counsel for the 1st appellant who put forth the same argument by drawing on some Indian cases on the equivalent section of the Indian Criminal Procedure Code cited in *The Code of Criminal Procedure* By Ratanlal Ranchhoddas and Dhirajlal Keshavlal Thakore, 13th Edn., which however I do not consider relevant and will not therefore consider.

I must admit that Encik Thevin's proposition appears attractive. However, it lacks objectivity as it ignores the fact that a decision had already been made in the trial within a trial. To interpret s. 261(a) without regard for the decision already made in the *voir dire* would run counter to the doctrine of *res judicata* as it applies in criminal cases. In criminal practice the doctrine encompasses the two principles of *autrefois acquit* and *autrefois convict* which are extraordinarily complex. But for the present purpose it is only necessary to apply the doctrine in its general form: that a matter is *res judicata* as between the parties to a particular case if it has been concluded by a judgment binding those parties in an earlier case (see *Litigation: Evidence & Procedure*, Aronson Reaburn Weinberg, Butterworth 3rd. Edn at 18.14). The doctrine is well stated in the Privy Council case of *Sambasivam v. Public*

- a* Prosecutor [1950] 16 MLJ 145 as quoted in Archbold, *Criminal Pleading Evidence and Practice* 41st Edn. at 4-109.

b In that case, the appellant was acquitted in a previous trial on a charge of illegally carrying firearms under the Emergency Regulation, 1948 Regulation 4(1). In a subsequent trial he was charged with and convicted for another offence of being in possession of ammunition under Regulation 33. In this trial the prosecution had relied upon the same cautioned statement used in the previous trial to secure a conviction. In allowing the appeal and quashing the conviction Lord MacDermott delivering the opinion of the Privy Council held (*obiter*) that:

- c* The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. **To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties for the adjudication.** (emphasis added).

d The principle has been invariably applied in both criminal and in civil trials with equal force, although I could find no direct precedent that it applies in a *voir dire*. Essentially a *voir dire* (popularly referred to as a trial within a trial) is a mini trial within the main trial convened for the purpose of determining whether the prerequisite to the admissibility of a piece of evidence has been satisfied in order that it can be admitted as evidence. A decision in such a mini trial is nonetheless a decision adjudicated upon authoritatively after hearing the parties. There is therefore no reason why the same principle should not apply to a *voir dire*. The differentiation becomes less obvious if one considers by analogy, that in civil cases it is not open to a party to demand before a succeeding Judge that an interlocutory application which has been allowed or dismissed by a previous Judge be reopened and rejudicated upon the former continuing the main hearing of the case whether *de novo* or from where it is left by the previous Judge.

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- g* The Sessions Court Judge was therefore right to disallow the 1st appellant to re-summon and re-examine the witnesses in the *voir dire*.

Reported by WA Shariff

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